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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES HERBERT, Defendant and Appellant.	H041535 (Santa Clara County Super. Ct. No. C1243276)

Defendant James Herbert appeals from a judgment of conviction entered after he pleaded no contest to possession for sale of a controlled substance (Health & Saf. Code, § 11378 - count 1), using or being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a) - count 2), and transportation, sale, and distribution of a controlled substance (Health & Saf. Code, § 11379, subd. (a) - count 3). As to count 1, defendant admitted the allegations that the amount possessed for sale was 57 grams or more (Pen. Code, § 1203.073, subd. (b)(2)) and that he had previously been convicted of Health & Safety Code section 11378 within the meaning of Penal Code section 1203.07, subdivision (a)(11). Defendant also admitted the allegations that he had twice been convicted of possession for sale of a controlled substance within the meaning of Health and Safety Code section 11370.2, subdivision (c). Defendant contends that the trial court

erred when it denied his motion to suppress evidence. We find no error and affirm the judgment.

I. Statement of the Case

A felony complaint alleged that in October 2012, defendant possessed for sale a controlled substance (Health & Saf. Code, § 11378) and was under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)).

At defendant's preliminary hearing, the magistrate heard defendant's suppression motion. The trial court denied the motion and held defendant to answer on the complaint.

An information was filed in January 2014, charging defendant with the previous two counts as well as a third count of transportation, sale, and distribution of a controlled substance (Health & Saf. Code, 11379, subd. (a)) and various enhancement allegations.

In April 2014, defendant filed a motion to dismiss the information and for de novo review pursuant to Penal Code sections 995 and 1538.5, subdivision (i), again seeking suppression of evidence. The prosecution filed opposition. Following a hearing, the trial court denied the motions.

A few weeks later, defendant pleaded no contest to all charges and admitted the enhancement allegations. The trial court sentenced defendant to five years in prison. The trial court imposed a mitigated term of two years on count 3, a mitigated stayed term of 16 months on count 1, and an additional three years for the prior convictions. It also imposed a 90-day jail sentence on the misdemeanor, count 2. Defendant filed a timely notice of appeal.

II. Statement of Facts[1]

At 4:34 p.m. on October 12, 2012, Officer Aric Enos and his partner Officer Pate were working on the special enforcement team. They wore plain clothes and were driving in an unmarked police vehicle. Officer Enos saw a motor home, which was driven by defendant, with an expired registration tag. Earlier that day, Officer Enos had received information that defendant was using his motor home to sell drugs.

After confirming that the vehicle registration had expired, Officer Enos initiated a traffic stop. When Officer Enos contacted defendant at the side window, he immediately noticed the odor of burnt marijuana coming from inside the motor home. Since Officer Enos could not see defendant's hands due to the level of the window, he asked him to step out of the motor home for officer safety. Defendant exited the motor home through the only door, which was located behind the front passenger seat in the living compartment of the motor home.

Officer Enos asked defendant to step onto the sidewalk. The officer conducted a pat search for officer safety after directing defendant to put his hands behind his back. The officer believed that defendant might be armed because he was wearing baggy clothing. The pat search took approximately 30 seconds. Officer Enos felt something in defendant's pocket, but it was not hard.

Officer Enos asked defendant to have a seat on the curb. Defendant provided the officer with his driver's license. Officer Enos asked defendant about the vehicle registration, and defendant acknowledged that it was expired. After Officer Enos asked defendant if he had smoked marijuana in the vehicle, defendant "said something similar to, yes, it's my home. I have nowhere else to smoke it." Officer Enos did not advise

[1] The statement of facts is based on the evidence presented at the combined preliminary hearing and hearing on defendant's motion to suppress evidence.

defendant of his *Miranda*[2] rights prior to asking this question. The conversation between the officer and defendant lasted between five and 10 minutes.

While Officer Enos was speaking with defendant, he noticed that when he asked defendant a question, "there was a delay and then he would answer you. . . . [H]is eyelids were very droopy. It looked like he was nearly falling asleep." The officer examined defendant's pupils, which did not dilate. Defendant's pulse was 120 beats per minute, which was very high for someone sitting on a curb. Officer Enos suspected that defendant was under the influence of methamphetamine, but his symptoms were not necessarily those of a typical user.

While defendant was sitting on the curb, he was not handcuffed. Officer Enos explained that he had not yet decided to arrest defendant, because people sometimes show symptoms of being under the influence due to medication. Officer Enos decided to investigate further and asked defendant when he had last used methamphetamine. Defendant responded that he had used it sometime in the afternoon of the previous day. At that point, defendant was placed under arrest. Prior to transporting defendant to the police station, officers emptied his pockets and discovered that the soft object which Officer Enos had detected during the pat search was $1,411 in cash.

Officer Enos conducted an inventory search of the motor home. He explained that departmental policy requires that, before a vehicle is towed, the officer note any items of value inside the vehicle to protect the police department and the towing company from liability claims. In addition to the inventory search, Officer Enos intended to search the vehicle for evidence of possession of methamphetamine or sale of methamphetamine based on defendant's symptoms.

Another officer took photographs "to kinda overview everything because there's no way [they] could inventory every last piece of property inside that motor home." The

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

search took approximately 20 to 30 minutes. Officer Enos observed multiple empty plastic bags of a type which are commonly used to package controlled substances for sale. There was a digital scale inside a small tool bag and there was some white residue on the scale. According to the officer, this type of scale is often used to weigh controlled substances for packaging for sales. Officer Enos next observed that when he moved a spray can of Brake Clean, it did not feel as if there was liquid inside. He attempted to spray the contents, but nothing came out. Based on his training and experience, the officer knew that fake spray cans are used to hide methamphetamine. He untwisted the bottom of the can and found multiple bags inside. There were 32 individual bags, each containing a white crystal substance. The contents of the bags weighed 137 grams.

The parties stipulated that the substance in the 32 bags tested positive for methamphetamine. They also stipulated that defendant's blood sample tested presumptive positive for methamphetamine.

III. Discussion

Defendant contends that his motion to suppress was erroneously denied.

"Where, as here, a motion to suppress is submitted to the superior court on the preliminary hearing transcript, 'the appellate court disregards the findings of the superior court and reviews the determination of the magistrate who ruled on the motion to suppress, drawing all presumptions in favor of the factual determinations of the magistrate, upholding the magistrate's express or implied findings if they are supported by substantial evidence, and measuring the facts as found by the trier against the constitutional standard of reasonableness.' [Citation.] 'We exercise our independent judgment in determining whether, on the facts presented, the search or seizure was reasonable under the Fourth Amendment. [Citation.]' [Citation.]" (*People v. Hua* (2008) 158 Cal.App.4th 1027, 1033.)

Defendant argues that his admission that he had smoked marijuana was unlawfully obtained.

The Fifth Amendment to the United States Constitution provides that no person "'shall be compelled in any criminal case to be a witness against himself.'" (U.S. Const., 5th Amend.) "[T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda*, *supra*, 384 U.S. 436, 444.) Thus, the United States Supreme Court has imposed on the police an obligation to advise a criminal suspect about his rights and to obtain a knowing and intelligent waiver of those rights prior to any interrogation. (*Id.* at pp. 471-475.)

Berkemer v. McCarty (1984) 468 U.S. 420 (*Berkemer*) provides guidance. In *Berkemer*, a police officer observed the respondent's vehicle weaving in and out of a highway lane and initiated a traffic stop. (*Id.* at p. 423.) The officer asked the respondent to exit his vehicle and perform a field sobriety test. (*Ibid.*) He also asked him if he had been using intoxicants and he replied that he had consumed two beers and smoked marijuana. (*Ibid.*) One of the issues in *Berkemer* was whether a police officer's roadside questioning of a motorist detained pursuant to a traffic stop constituted a custodial interrogation, thereby requiring the advisement of *Miranda* rights. (*Id.* at p. 427.)

Berkemer acknowledged that a traffic stop curtails the "'freedom of action'" of the occupants of a detained vehicle. (*Berkemer*, *supra*, 468 U.S. at p. 436.) However, the court considered "whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." (*Id.* at p. 437.) *Berkemer* pointed out two features of an ordinary traffic stop that mitigated the danger that a motorist's free exercise of the privilege against self-incrimination would be impaired. First, a traffic stop is generally temporary and brief. A motorist expects that he or she will most likely be allowed to leave after answering some questions and waiting while the officer checks the

motorist's license and registration, and possibly issues a citation. (*Ibid.*) Second, the motorist during a traffic stop does not feel "completely at the mercy of the police" because the traffic stop is public. (*Id.* at p. 438.) This exposure reduces an officer's ability to elicit incriminating statements through illegitimate means and diminishes a motorist's fear that he or she will be subjected to abuse. (*Ibid.*) *Berkemer* analogized the traffic stop to a "'*Terry*[3] stop'" in which "the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." (*Berkemer*, at pp. 439-440, fns. omitted.) Turning to the case before it, the court observed that the respondent had failed to show that he was "subjected to restraints comparable to those associated with a formal arrest." (*Id.* at p. 441.) *Berkemer* reasoned that since the respondent was detained for a short period of time before his arrest and he was never informed that his detention would not be temporary, the respondent was not in custody for *Miranda* purposes until he was arrested. (*Berkemer*, at pp. 441-442.)

Here, there is no dispute that the initial detention for expired registration was lawful. This detention was brief and occurred in public view during daylight hours. The officer conducted a limited pat search for weapons. Defendant was never told that the detention would not be temporary. When defendant made the statements, he had not

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[3] *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*).

been formally arrested. Thus, defendant was not in custody for *Miranda* purposes until he was arrested.

Defendant argues, however, that *Berkemer* is inapposite. Relying on *In re J.G.* (2014) 228 Cal.App.4th 402 (*J.G.*), he argues that the pat search and the request to sit on the curb were comparable to restraints associated with an arrest. Defendant's reliance on *J.G.* is misplaced. In that case, Officer Woelkers approached a juvenile and his brother and asked if he could speak to them. (*Id.* at p. 405.) The juvenile answered, "'[Y]eah.'" (*Ibid.*) Less than a minute later, another officer arrived. (*Ibid.*) Officer Woelkers asked the brothers for identification, ran a records check, and conducted consensual pat searches while physically restraining them. (*Id.* at pp. 405-406.) Meanwhile, two more officers arrived, and one of the officers handed a rifle to one of the others. (*Id.* at p. 406.) At this point, Officers Woelkers asked the brothers to sit on the curb, which they did. (*Ibid.*) As they were sitting on the curb, Officer Woelkers obtained the juvenile's consent to search the juvenile's backpack and found a firearm. (*Ibid.*) About 10 or 15 minutes passed between the officer's first contact with the brothers and the juvenile's arrest. (*Ibid.*) *J.G.* held that the officer's interaction with the juvenile began as a consensual encounter, but "turned into a detention as Officer Woelkers's suspicions persisted without apparent reason, as the encounter became increasingly intrusive, as the minutes passed, and as the police presence and show of force grew. We conclude that by the time Officer Woelkers asked [the juvenile] to sit on the curb, a reasonable person in [his] circumstances would not have felt free to end the encounter." (*Id.* at p. 411.) *J.G.* is distinguishable from the present case. Here, the issue is not whether a consensual encounter turned into a detention, but whether a lawful detention "subjected [defendant] to restraints comparable to those associated with a formal arrest." (*Berkemer, supra,* 468 U.S. at p. 441.)

Nor are we persuaded that defendant was in custody for *Miranda* purposes based on the pat search by Officer Enos. During a traffic stop, an officer may perform a pat

search of a driver if he or she "has reason to believe that he is dealing with an armed and dangerous individual . . . ." (*Terry*, *supra*, 392 U.S. at p. 27.) Thus, courts must determine "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. [Citations.]" (*Ibid.*) *People v. Collier* (2008) 166 Cal.App.4th 1374 is instructive. In *Collier*, officers conducted a traffic stop because the vehicle lacked a front license plate. (*Id.* at p. 1376.) One officer spoke to the driver while the other approached the front passenger seat, which was occupied by the defendant. Both officers smelled marijuana emanating from the vehicle. (*Ibid.*) The defendant was asked to step out of the car and asked if he had any weapons or illegal items on his person. The defendant, who was taller than the officer and wearing baggy shorts, answered no. The officer conducted a pat search and found a loaded handgun and a jar of PCP. (*Id.* at pp. 1376-1377.) *Collier* concluded: "The trial court correctly and reasonably ruled that there were specific and articulable facts to conduct a limited pat down based on officer safety and the presence of drugs. As the Fourth Circuit Court of Appeals has observed; 'guns often accompany drugs.' [Citation.] '[I]n connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others.' [Citation.]" (*Id.* at p. 1378.) Similarly, here, Officer Enos conducted a lawful traffic stop and smelled the odor of burnt marijuana emanating from the motor home, and ordered defendant, who was wearing baggy clothing, out of the vehicle. In addition, the officer had earlier received information that defendant was selling drugs from his motor home. As in *Collier*, there were sufficient facts to conduct a limited pat search.

Defendant, however, relies on *People v. Medina* (2003) 110 Cal.App.4th 171 (*Medina*). In *Medina*, two officers stopped the defendant's car for driving with a broken taillight. (*Id.* at p. 174.) When the officers approached the defendant's car, they ordered

him to step out, place his hands behind his head, walk backwards toward the officers, and face an adjacent wall. The defendant complied with their orders. (*Id.* at pp. 174-175.) One of the officers decided to search the defendant because they were in a "'high-gang location,'" grabbed the defendant's hands, and asked if he had any weapons "'or anything he should know of prior to the search.'" (*Id.* at p. 175.) The defendant answered that he had a "'rock'" and the officer found rock cocaine in the defendant's pocket. (*Ibid.*) *Medina* concluded that "[b]ecause the decision to restrain [the defendant's] hands and search him was based solely on his presence in a high crime area late at night, both the detention and search were unlawful." (*Id.* at p. 178.) Unlike in *Medina*, here, as previously stated, there were additional facts justifying the pat search.

Defendant also contends that the search of the motorhome was not justified as a search incident to his arrest.

The Fourth Amendment, made applicable to the states through the due process clause of the Fourteenth Amendment, protects the individual against unreasonable searches and seizures. (*Mapp v. Ohio* (1961) 367 U.S. 643, 646-660.) The general rule is that "'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' [Citation.]" (*Arizona v. Gant* (2009) 556 U.S. 332, 338.) One of these exceptions is the vehicle exception. (*Id*. at p. 347.) Pursuant to the vehicle exception, the "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Id*. at p. 351.)

In *People v. Nottoli* (2011) 199 Cal.App.4th 531(*Nottoli*), this court considered whether there was a reasonable basis to believe evidence relevant to the defendant's arrest for being under the influence of a controlled substance might be found in his vehicle. (*Id.* at p. 551.) *Nottoli* concluded that there was and stated: "When a driver is

arrested for being under the influence of a controlled substance, the officers could reasonably believe that evidence relevant to that offense might be found in the vehicle. The presence of some amount of the controlled substance or drug paraphernalia in the interior of the vehicle would be circumstantial evidence tending to corroborate that a driver was in fact under the influence of the controlled substance." (*Id.* at p. 554.)

Here, defendant displayed the symptoms of being under the influence of a controlled substance. After he admitted that he had used methamphetamine, Officer Enos arrested him. Thus, as in *Nottoli*, it was reasonable to believe that there was evidence of criminal activity in the motorhome.

Defendant claims that *Nottoli* supports his position that the search of the motorhome was unreasonable. He relies on the following language: "*Gant* provides the generalized authority to search the entire *passenger compartment* of a vehicle and any containers therein incident to arrest. [Citation.] *Gant* implicitly determined that these requirements were sufficient to ensure that vehicular searches incident to arrest were tethered to legitimate governmental interests related to arrest and adequately addressed 'the central concern underlying the Fourth Amendment' that police officers not have 'unbridled discretion to rummage at will among a person's private effects.' [Citation.] Consequently, having determined that a vehicular search incident to arrest was justified because evidence relevant to the offense of being under influence might be found in [the defendant's] vehicle, the deputies were justified in searching the vehicle's *passenger compartment* and 'any containers therein.' [Citation.]" (*Nottoli, supra*, 199 Cal.App.4th at p. 555, italics added.) Thus, defendant argues that the living space of his motorhome "is clearly beyond the *passenger compartment*, as that term is employed in" *Gant*. We disagree. First, defendant exited the motorhome through a door behind the passenger seat, and thus the living space of the motorhome was as readily accessible to defendant as the back seat of the passenger compartment of an automobile. Second, that defendant was living in his motorhome did not render the vehicle exception to the warrant

requirement inapplicable. As *California v. Carney* (1985) 471 U.S. 386 (*Carney*) explained: "Our application of the vehicle exception has never turned on the other uses to which a vehicle might be put. The exception has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation." (*Id.* at p. 394.)

Defendant's reliance on *People v. Pressey* (2002) 102 Cal.App.4th 1178 is also misplaced. In *Pressey*, officers conducted a traffic stop, arrested the defendant for driving under the influence of controlled substances, and found methamphetamine in his possession. (*Id.* at p. 1181.) One of the officers then sought a warrant to search the defendant's residence. (*Ibid.*) The magistrate found probable cause to search the defendant's residence for drugs and paraphernalia based on the defendant's arrest for possession of a controlled substance and the officer's opinion that drug users with controlled substances on their person or in their cars are more likely to have these substances at their residence. (*Id.* at p. 1182.) *Pressey* concluded that "probable cause to search the residence of someone suspected of using illegal drugs requires more than an opinion or inference, available in every case, that drugs are likely to be present." (*Id.* at p. 1190.) *Pressey* is distinguishable from the present case. *Pressey* did not involve a motor home, which falls within the vehicle exception to the warrant requirement. (*Carney*, *supra*, 471 U.S. 386.)[4]

In sum, the trial court did not err when it denied defendant's motion to suppress evidence.

IV. Disposition

The judgment is affirmed.

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[4] Defendant also argues that an inventory search was not justified. We need not consider this issue since the officers lawfully conducted a search of the motorhome incident to defendant's arrest.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Grover, J.